No. 94-1522

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

*RONALD KEITH ALLRIDGE,*
Petitioner,

v.

*WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,*
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals For the Fifth Circuit

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Was the jury given a viable alternative to finding Allridge guilty of capital murder by the inclusion of the charge on murder, so that his conviction and death sentence are reliable?

2. Did the trial court's refusal to admit testimony that, if sentenced to life imprisonment, Allridge probably would never be paroled violate his rights under the eighth and fourteenth amendments?

3. Was Allridge entitled to an additional instruction at the punishment phase on consideration of mitigating evidence, on the basis of either the evidence he did introduce or that he had available but elected not to present?

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**RESPONDENT'S BRIEF IN OPPOSITION**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the

Attorney General of Texas, and files this Brief in Opposition.

## OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is published at 41 F.3d 213 (5th Cir. 1994). A copy is included at pages App. 1a-19a of the petition.

## JURISDICTION

Allridge seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although he does not expressly state it, Allridge bases his claims upon the eighth and fourteenth amendments to the United States Constitution. Also implicated are the former Texas capital sentencing statute, Article 37.071(b) of the Texas Code of Criminal Procedure, and the statutes defining murder, felony murder, and capital murder, Sections 19.02(b)(1) and (2), 19.02(b)(3), and 19.03, respectively, of the Texas Penal Code.

## STATEMENT OF THE CASE

### *A. Course of Proceedings and Disposition Below*

Allridge was indicted in Tarrant County, Texas, for the murder of Carla McMillen Otto during the commission of a robbery, a capital offense. He was tried before a jury, which on November 14, 1985, found him guilty. After a separate punishment hearing, the jury on November 18,

1985, affirmatively answered the special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981), and Allridge was sentenced to death as required by law. The Court of Criminal Appeals affirmed the conviction and sentence on May 11, 1988, *Allridge v. State*, 762 S.W.2d 146 (Tex.Crim.App. 1988), and denied rehearing on September 21, 1988. This Court denied *certiorari* on February 21, 1989. *Allridge v. Texas*, 489 U.S. 1040 (1989).

On March 10, 1989, the trial court scheduled Allridge's execution for May 2, 1989. On April 27, 1989, Allridge filed an application for writ of habeas corpus in the state convicting court pursuant to Article 11.07 of the Texas Code of Criminal Procedure. On the same date, the trial court modified Allridge's execution date to August 2, 1989. On July 17, 1989, the trial court again modified the execution date to November 15, 1989. The trial court held an evidentiary hearing on October 3-5, 1989. On October 19, the trial court modified the execution date a third time to January 18, 1990. On January 2, 1990, the trial court entered a fourth order modifying the execution date to February 22, 1990. On January 4 1990, the trial court entered factual findings and legal conclusions, recommended denial of the writ, and forwarded the writ to the Court of Criminal Appeals.

The Court of Criminal Appeals stayed Allridge's execution on February 12, 1990, and set the case for consideration of Allridge's claim that trial counsel was prevented from offering mitigating evidence. On June 26, 1991, the Court of Criminal Appeals denied the writ. *Ex parte Allridge*, 820 S.W.2d 152 (Tex. Crim. App. 1991). Rehearing was denied on October 9, 1991. Allridge then requested the Court of Criminal Appeals to stay its

mandate for ninety days to enable him to file a petition for writ of *certiorari*, "if [Allridge] decides to do so." That motion was granted, but Allridge never filed a *certiorari* petition.

After the Court of Criminal Appeals issued its mandate on January 23, 1992, the trial court scheduled Allridge's execution for March 25, 1992. On March 17, 1992, Allridge filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Fort Worth Division. The court granted a stay of execution and, after briefing of the issues by the parties, heard argument on several of Allridge's contentions. After further briefing following the argument, the court issued its Memorandum Opinion and Order rejecting Allridge's claims, and entered final judgment denying habeas corpus relief. The court granted Allridge's request for certificate of probable cause to appeal. After briefing and oral argument, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of relief. *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994).

### *B. Statement of Facts*

The facts of the crime are accurately set forth in the opinion of the Court of Criminal Appeals. *Allridge v. State*, 762 S.W.2d at 149-50.

During the punishment phase of trial, the state presented evidence from nineteen witnesses. Detective J.J. Lee testified that Allridge confessed to a number of unsolved robberies after he was taken into custody in connection with this case. Twelve witnesses testified to the details of robberies at various restaurants and convenience stores where they worked or were customers, each with a set of circumstances similar to those in the

instant robbery, and all of them robberies to which Allridge had confessed. George K. Wilson, a fingerprint expert with the Tarrant County Sheriff's Office, testified that he took Allridge's fingerprints, compared them with prints contained in a penitentiary packet, and found them to be identical. The packet indicated that Allridge had been convicted in 1977 for the offense of murder. The other four witnesses testified about another robbery-murder Allridge had admitted committing prior to the one for which he was being tried.

Allridge introduced the testimony of his father, who related the family's efforts to get psychiatric help for Allridge while he was in the Texas Department of Corrections after being convicted of another murder. He stated that the family sought help because doctors who examined Allridge prior to his murder trial said that he was schizophrenic. He also testified about abuse that Allridge suffered from other inmates. He further testified that Allridge had been a good person while growing up and had good relationships with his parents. Don Dennis, a minister who ran a church primarily for ex-convicts, testified that he had been a prison inmate for years until he accepted religion and changed his life. He felt that if he could change, anyone could, if given the chance.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Allridge has advanced no special or important reasons in this case, and none exists. The petition presents only the issue whether the court below correctly applied settled principles of law to the facts, and therefore raises no important issue of law.

### II.

### THE TRIAL COURT'S INSTRUCTION ON MURDER GAVE THE JURY THE OPTION OF CONVICTING ALLRIDGE OF A LESSER CRIME THAN CAPITAL MURDER.

The state's case against Allridge was predicated on the theory that only two shots had been fired during the robbery: one when the gunmen entered the restaurant, and the second, fatal shot. Allridge, on the other hand, contended that he had been startled by the sound of a third shot and that his own gun went off as a reaction to that sound. Thus, he argued, the killing had not been intentional and he could not be guilty of capital murder. Allridge requested instructions on the lesser offenses of

murder and felony murder. The court denied the request for a felony murder instruction but included one on murder. Allridge now contends that the denial of a felony murder instruction denied him due process because, had the jury believed that the killing was not intentional, it had no way to express that except by acquitting him of any crime at all. He asserts that this violates the holding of *Beck v. Alabama*, 447 U.S. 625 (1980). He also alleges that the state compounded the error by suppressing the corroborating statement of his codefendant, in violation of the Due Process Clause and the holding in *Brady v. Maryland*, 373 U.S. 83 (1963).

### *A. Because murder included a lower culpable mental state than capital murder, Allridge's jury had the "third option" of convicting him of a noncapital crime.*

In *Beck v. Alabama*, the Court considered a state statute that prohibited a jury instruction in a capital murder trial on the lesser offense of felony murder, even if the record supported the lesser crime. Under this scheme, the jury had only two choices: it could convict of capital murder, in which case a death sentence was mandatory, or it could acquit him. The Court observed that the unavailability of an instruction on a lesser-included, non-capital offense increased the likelihood that the jury would return a verdict of guilty, not because it had found the defendant was guilty of the capital crime, but because it believed the defendant was guilty of some serious crime and felt that he should be punished rather than set free. *Beck v. Alabama*, 477 U.S. at 642-43. In such a situation,

the Court held, due process requires that that the jury be given a "third option." *Id.* at 637-38; *see also Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984); *Hopper v. Evans*, 456 U.S. 605, 610 (1982).

Allridge claims that his jury was faced with this "all or nothing" situation, even though the jury had the option of finding him guilty of first-degree murder. He contends that murder and capital murder have the same culpable mental state (intentional), and that the only element that distinguishes them is that capital murder requires that the killing be in the course of committing or attempting to commit another felony. *Compare* TEX. PENAL CODE § 19.02(b)(1) (Vernon 1994) (murder) *with, id.* § 19.03 (capital murder). Because it was undisputed that Allridge was engaged in committing an aggravated robbery at the time of the killing, he asserts that finding him guilty of murder was not a viable alternative. Felony murder, on the other hand, defined as committing an act clearly dangerous to human life that causes a death while the actor is intentionally committing another felony, offered the jury the option of finding that the killing was not intentional. TEX. PENAL CODE § 19.02(b)(3) (Vernon 1994). Had this instruction been given, Allridge contends, the jury could have believed his version of events and been able to express that belief by finding him guilty of the lesser offense.

The Court addressed a similar claim in *Schad v. Arizona*, 501 U.S. 624 (1991). There, the defendant was charged with first-degree murder. He requested a charge on theft, claiming that the evidence showed at most that he merely had stolen from the victim but had not killed him. Instead, the court instructed the jury only on first- and

second-degree murder,[1] and the defendant was convicted of first-degree murder. In this Court, the defendant argued that he was entitled to a theft instruction pursuant to *Beck*. The Court disagreed. It noted that *Beck* addresses only those cases in which the jury is faced with an "all-or-nothing" decision. *Id.* at 644-48. Where the jury is given a third instruction that is supported by the evidence, due process is no longer implicated. The defendant conceded that the evidence supported a finding of second-degree murder; therefore, *Beck* did not require an additional instruction.

The defendant argued that, although a third instruction may satisfy due process, the instruction must conform with the defense's theory. Otherwise, the jury will not be able to express its agreement with the defendant's theory of the case. Disagreeing again, the Court pointed out that the concern in a *Beck* claim is not the way that the jury is instructed but the reliability of the capital murder verdict. The Court observed further:

> To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as

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[1] The jury was instructed that first-degree murder was "murder which is the result of premeditation . . . . Murder which is committed in the attempt to commit robbery is also first degree murder." *Schad*, 501 U.S. at 629. The Arizona statute defined certain crimes as first-degree murder, then stated that "All other kinds of murder are of the second degree." *Id.* at 628, n.1.

> its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

*Schad,* 501 U.S. at 647.

Allridge's argument fails under *Schad* because it is based on the faulty premise that the sole culpable mental state for murder is "intentional." However, the statutory definition of murder in Texas is:

> A person commits an offense if he:
>
> (1) intentionally *or knowingly* causes the death of an individual . . . .

TEX. PENAL CODE § 19.02(b)(1) (Vernon 1994) (emphasis added). That is, murder can be committed either intentionally or with the lesser mental state of "knowing." Allridge's jury was charged on murder in accordance with the statutory definition. It also was instructed on the definition of "knowing":

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware

> that his conduct is reasonably certain to cause the result.

Tr 508-09.[2]

Thus, the jury had the option of convicting Allridge of knowingly but not intentionally committing the murder. Indeed, during final argument at the guilt-innocence phase, Allridge's attorney emphasized that the key to the jury's verdict was the question of Allridge's mental state. He reviewed the evidence that he believed supported the theory that Allridge had not acted intentionally. At the conclusion of his argument, he stated:

> "I ask you to consider the lesser included charge of murder. This man is not guilty of capital murder. They have not shown an intentional killing. If you'll read the charge, you'll find that there can be a knowing offense. That is defined for you on the second page of the charge. I ask you to find the man not guilty of capital murder."

XXIX SR 461.

Allridge's jury was not limited to finding that he committed the murder intentionally, and therefore was guilty of capital murder, or acquitting him. It could have believed that he pulled the trigger as a startled reaction to the sound of another shot and still have found him guilty of

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[2] "Tr" refers to the transcript of documents filed in connection with Allridge's trial. "SR" refers to the record of Allridge's state trial, preceded by the volume number and followed by the page number. "SEH" refers to the transcription of the proceedings at the state evidentiary hearing, preceded by the volume number and followed by the page number.

knowingly committing first-degree murder. Even though the murder occurred during the commission of a robbery, if the jury found that Allridge did not have the requisite intent for capital murder, it could find him guilty of the lesser crime. Because the jury had the "third option" required by *Beck*, there was no due process violation, and *certiorari* review is not warranted.

### *B. There is no reasonable likelihood that the jury's verdict would have been different if it had known of the co-defendant's statement.*

Allridge also contends that the state suppressed the statement of his co-defendant, Milton Ray Jarmon, which he maintains corroborated his contention that he did not have the specific intent to kill. He asserts that this was an independent due process violation, as well as exacerbating the alleged *Beck* violation.

To prevail on a *Brady* claim, a habeas petitioner bears the burden of showing that: (1) the prosecution suppressed evidence, (2) the evidence was favorable to him, and (3) the evidence was "material either to guilt or punishment." *Brady*, 373 U.S. at 87. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).[3] The purpose of the *Brady* rule

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[3] Allridge, although acknowledging that this is the proper standard, argues that the Court should apply a "probable-effect inquiry." Pet. at 22, citing to *Kyles v. Whitley*, 5 F.3d 806, 811 (5th Cir. 1993), *cert. granted*, 114 S.Ct. 1610 (1994). There is no real difference between the *Bagley*

is to assure that the accused is not denied access to favorable information known to the government but unknown to him. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Allridge can show neither suppression of the evidence by the state nor materiality.

Jarmon gave a confession after his arrest in which he stated:

> I heard a shot go off and a glass broke out. I ran and jumped the counter. I heard another shot go off, it was my gun when I went over the counter. I was going over the counter and I slipped and fell on the floor. That's when I heard another shot go off.

The prosecutors admittedly did not disclose this statement to Allridge's attorney. However, as counsel acknowledged at the state evidentiary hearing, he was aware of the statement's existence and even had discussed the case with Jarmon's attorney, although he did not ask him for a copy of the statement.[4] III SEH 172-73. As the court below noted, where it is the defendant's lack of diligence that prevents his having access to certain material, there can be no *Brady* violation. *Allridge v. Scott*, 41 F.3d at 218 n.6, *citing United States v. Ellender*, 947 F.2d 748, 757 (5th Cir. 1991). Because Allridge had other ways to gain

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standard and the "probable-effect inquiry," and the Fifth Circuit did not purport to use a different method of determining materiality. At oral argument in *Kyles*, both parties agreed that the *Bagley* standard was the appropriate measure to employ. *See Kyles v. Whitley*, No. 93-7927, Tr. Or. Arg. at 3, 26, 29.

[4] Allridge did call Jarmon as a witness at trial, but Jarmon invoked his right to silence on the advice of counsel and refused to testify. XXVIII SR 370-71

access to the statement, he cannot complain that it was suppressed by the state.[5]

Even if the state had an obligation to produce Jarmon's statement, Allridge cannot prevail on his *Brady* claim because he cannot show that the information was material to his case. The court below noted two difficulties with the statement: 1) it did not and could not say anything about Allridge's mental state at the time he fired his gun, and 2) to the extent that it *was* relevant to his mental state, it was cumulative of other evidence already before the jury. Because of this, there is no reasonable probability that the result of the trial would have been different if the statement had been available.

First, Jarmon's statement revealed nothing about Allridge's state of mind when the fatal shot was fired. Jarmon stated merely that he heard a gunshot as he fell to the floor while leaping over the counter, and that he realized that it was his gun that had discharged. After that, he heard another shot, probably the one fired by Allridge that killed Otto.[6] Jarmon's statement does not say anything about a connection between his gun's firing and Allridge's shooting Otto. This is not surprising given that Jarmon, having fallen to the floor behind the counter, had no way of knowing what was going on in the rest of the restaurant at the time. His statement does not say, because it could not, that Allridge even heard Jarmon's gun go off. Other people closer to Jarmon than Allridge was did not hear the

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[5] The court below noted that Allridge also could have sought a court order for the state to produce the statement once he was aware that it existed. *Allridge v. Scott*, 41 F.2d at 217.

[6] Even this is far from certain. A reasonable interpretation of Jarmon's statement "That's when I heard another shot go off," is that he merely was reiterating that he heard his own gun fire after he fell down.

shot, and people near Allridge did not hear another shot before Allridge fired his gun. It is not even possible to say from the statement how close in time the two shots were to each other. The best that Jarmon's statement does for Allridge is to put the fatal shot at a time after Jarmon's own gun went off. The relation between Jarmon's statement and Allridge's theory of defense is so tenuous as to divest the statement of any exculpatory value. It certainly does not qualify as material evidence.

Second, whatever value Jarmon's statement had that was relevant to Allridge's mental state was cumulative of other evidence already before the jury. Although the state proceeded on a theory that only two shots were fired in the restaurant, there was significant evidence that there were really three shots. There was no denying that one shot broke out a glass door as the robbers entered the restaurant and that another killed Otto. There also was a spent shell on the floor behind the counter, in the area where Jarmon said his gun went off. The shell was the same caliber as the gun that Jarmon was using. Some witnesses either gave statements or testified to hearing three shots. Nonetheless, the jury rejected Allridge's defense that he fired his gun as a startled reflex to the third shot. There is no reasonable probability that the addition of Jarmon's statement, which added nothing that the jury did not know already, would have changed the outcome of the trial.[7] The court of appeals correctly determined that the statement was not material evidence, and Allridge offers no reason why *certiorari* should be granted to review that conclusion.

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[7] For the same reasons, the statement was not material to the jury's determination of the first punishment issue: whether Allridge acted deliberately and with the reasonable expectation that the victim's death would result.

## III.

## THE JURY IN THIS CASE WAS INSTRUCTED ADEQUATELY ON THE SECOND PUNISHMENT ISSUE.

During the punishment phase, Allridge attempted to present the testimony of a former state parole commissioner to testify that, in light of Allridge's record, he would not be released on parole if he were sentenced to life imprisonment, even though he would be eligible for release after serving twenty years. The trial court ruled the evidence inadmissible because state law prohibited the jury from considering the question of parole. XXXII SR 923-87. Allridge argues that, in light of *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), the exclusion of the testimony violated his right to due process.

### *A.* *Allridge's claim based on* Simmons v. South Carolina *is barred by the nonretroactivity rule of* Teague v. Lane.

In *Simmons*, the Court held that, when the state predicates a death sentence on the defendant's probable future dangerousness, and state law provides for a life sentence without the possibility of parole, due process requires that the defendant must be permitted, upon request, to inform the jury of his parole ineligibility. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new constitutional rules of criminal procedure will not be announced or applied in cases on collateral review unless the rule falls within one of two narrow exceptions. The

rule that Allridge seeks is a new one that does not fit within either exception, and, thus, it cannot be applied to his case.

Allridge first argues that the rule he is invoking is not a new one. "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Graham v. Collins*, 113 S.Ct. 892, 897 (1993), quoting *Teague*, 489 U.S. at 301 (emphasis in *Teague*). "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' *Butler v. McKellar*, 494 U.S. 407, 415 (1990), or, put differently, if 'reasonable jurists may disagree.' *Sawyer v. Smith*, 497 U.S. 227 (1990)." *Stringer v. Black*, 112 S.Ct. 1130, 1141 (1992) (Souter, J., dissenting). Not only is the rule in *Simmons* a new one, Allridge is asking that that rule be extended to cover a new class of cases.

Allridge contends that because the opinion in *Simmons* cited to and relied on *Gardner v. Florida*, 430 U.S. 349 (1970) and *Skipper v. South Carolina*, 476 U.S. 1 (1985), it was dictated by those cases and, therefore, is not a new rule. The relevant inquiry, however, is not whether there is case support for the decision the court reaches. It is a rare case that can cite to no precedent for its result. Rather, the question is "whether reasonable jurists reading the case law that existed in [1989, when Allridge's conviction became final] could have concluded that [Allridge's] sentencing was *not* constitutionally infirm." *Graham v. Collins*, 113 S.Ct. at 903. In 1989, the leading case on the subject was *California v. Ramos*, 463 U.S. 992 (1983). There, the Court had held that the determination whether to inform capital sentencing juries about such

things as parole, clemency, and the like was purely a matter of state law. Reading *Ramos*, reasonable jurists could conclude that there was no constitutional requirement that juries in capital cases be instructed about a defendant's ineligibility for parole if given a life sentence. Thus, the rule announced in *Simmons* is a new rule.

Moreover, the *Simmons* rule does not apply to a state like Texas, where there is no such punishment as a life sentence without the possibility of parole. A capital murder defendant sentenced to life imprisonment in Texas in 1985, as Allridge was, is eligible for parole after serving twenty years of his sentence. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15(b) (Vernon 1979). The *Simmons* Court noted that:

> In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." *[Ramos]*, 463 U.S. at 1014.

*Simmons*, 114 S.Ct. at 2196. Thus, not only is the rule of *Simmons* a new rule that could not be applied to Allridge's case were it applicable, the extension of the rule that

Allridge advocates would be a further violation of *Teague*'s holding.

Finally, neither of the two narrow exceptions to nonretroactivity exists. The new rule at issue would not place certain persons beyond the government's power to punish or conduct beyond its power to proscribe. Thus, it does not fall within the first *Teague* exception. *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). Nor does it constitute a "bedrock" procedural rule that is necessary to ensure fundamental fairness or accurate fact-finding. *Teague*, 489 U.S. at 307.

### *B. Allridge was not entitled under the Constitution to present evidence that, if sentenced to life imprisonment, his release on parole was unlikely.*

Even if *Teague* did not bar review of Allridge's claim, his claim is not worthy of the grant of *certiorari*. The court of appeals correctly held that *Simmons* was limited to states where a person sentenced to life had no legal possibility for release on parole, and did not apply to Texas even if there was, in fact, no expectation of release. *Allridge v. Scott*, 41 F.3d at 221. Allridge argues that nothing in *Simmons* justifies the distinction drawn by the court below between legal ineligibility for parole and factual ineligibility.

Contrary to Allridge's argument, the Court expressly remarked that in those states where parole is available to a capital defendant sentenced to life, it is up to

the states to determine whether the jury will be informed about parole laws. *Simmons,* 114 S.Ct. at 2196; *see supra* at 18. Because Allridge would have been eligible for parole in twenty years if he had been sentenced to life, the state could prohibit the jury from receiving information about parole without violating the Due Process Clause. *Ramos* still controls in states such as Texas.[8]

### *C. The second punishment issue is not unconstitutionally vague.*

Allridge also argues that the second punishment issue is unconstitutionally vague and imprecise. The second issue asks "whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981). Allridge contends that the use of the conditional "would" in the issue, without informing the jury of the predicate condition, requires jurors to guess what it is and produces an unreliable sentencing result.

As the court below found, this is merely a variation on Allridge's complaint that he should have been able to inform the jury that he probably never would be released on parole. *Allridge v. Scott,* 41 F.3d at 222 n.13. Because there is no constitutional right to have the jury instructed in

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[8] The Court also recognized that where the state's argument that the defendant will be a future danger is based on his threat to prison inmates and staff, information about parole is less important to insuring a just sentencing result. *Simmons,* 114 S.Ct. at 2194-95 n.5. The state introduced evidence about Allridge's assaults on other inmates as part of its case on punishment to argue that he would be a danger even if confined to prison. XXXIII SR 1052.

this manner, there can be no constitutional infirmity in the wording of the statute.

## IV.

## THERE WAS NO IMPEDIMENT TO ALLRIDGE'S PRESENTING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE OF THE TRIAL, AND THE EVIDENCE HE DID INTRODUCE WAS NOT BEYOND THE JURY'S EFFECTIVE REACH.

At the punishment phase, Allridge introduced hearsay testimony of unspecified abuse he had suffered from other inmates at a juvenile detention facility and of a prior diagnosis of schizophrenia. He contends that there was additional evidence of emotional disturbance in his background that he could have presented, but that his attorneys made a conscious decision not to use it because it was more likely to result in affirmative answers to the punishment issues than to have the intended mitigating effect. He asserts that this was a violation of his right to due process.[9]

To the extent that Allridge is complaining that the trial court's refusal to give an instruction on consideration of mitigating evidence prevented the jury from being able to give effect to the evidence that was not introduced, the court below correctly rejected the claim. Quoting from *Delo v. Lashley*, 113 S.Ct. 1222, 1225 (1993), the court noted that "[n]othing in the Constitution obligates state

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[9] Allridge does not claim that counsel were ineffective for electing not to introduce the additional evidence.

courts to give mitigating circumstance instructions when no evidence is offered to support them." *Allridge v. Scott*, 41 F.3d at 223.

To the extent that Allridge's complaint is that the jury could not give effect to the mitigating evidence that he did present, the court of appeals correctly denied relief. The court noted that Allridge had failed to show any connection between his alleged abuse and schizophrenia and the crime that he committed. As Justice O'Connor noted in *California v. Brown*:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

479 U.S. 538, 545, (1987) (O'Connor, J., concurring). Because Allridge failed to show that his crime was attributable to his alleged mental problems and child abuse, he has not demonstrated a constitutional violation. His claim does not warrant the granting of a writ of *certiorari*.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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